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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

	:	**Case No. 1:01-CV-9000**
	:	
IN RE: SULZER HIP PROSTHESIS	:	**(MDL Docket No. 1401)**
AND KNEE PROSTHESIS	:	
LIABILITY LITIGATION	:	**JUDGE O'MALLEY**
	:	
	:	**MEMORANDUM AND ORDER**
	:	

On March 12, 2002, the parties submitted to the Court an amended proposed settlement agreement and a joint motion for preliminary approval. For the reasons stated below, the motion for preliminary approval of the proposed settlement agreement is **GRANTED**.

* * * * *

On August 29, 2001, the Court entered a summary Order conditionally certifying a settlement class, preliminarily approving the proposed class settlement agreement, and preliminarily appointing class co-counsel. In that Order, the Court stated it would set out its reasoning and analysis in a separate memorandum and order. On August 31, 2001, the Court issued this supplemental memorandum and order ("Class Order"), in which, among other things, it explained at length the reasons upon which it based its conclusion that the parties' proposed settlement agreement was entitled to preliminary approval. See Class Order at 31-52. The Court's analysis of the fairness of the proposed settlement agreement in the Class Order essentially followed the following scheme: (1) examination of the standards for determining the fairness of the proposed class action settlement under Fed. R. Civ. P. 23(e), id. at 31-35; (2) examination of the specific terms of the proposed settlement agreement, id. at 35-37; (3) analysis of the fairness of the

specific terms of the proposed settlement agreement, in light of the applicable standards, id. at 38-51.

Subsequently, the parties moved to amend the definition of the class, and also moved for preliminary approval of an amended proposed settlement agreement. The Court granted these motions, following the same method of analysis to determine whether the proposed settlement agreement was entitled to preliminary approval. Order at 18-28 (Oct. 19, 2001) ("Revised Class Order"); see id. at 27 (noting "the great likelihood that the parties will, in the future, submit new proposed settlement agreements"). Given that the standards for assessing fairness remained the same, the Court merely incorporated into the Revised Class Order, by reference, the first part of its fairness analysis contained in the Class Order. The Court does so here, as well. Further, the Court noted in the Revised Class Order that there was "no good reason . . . to repeat, for example, the discussion of how the proposed revised settlement agreement treats subrogation interests, see Class Order at 47-48, given that the revised agreement is identical to the prior agreement in this respect." Revised Class Order at 19. Again, the Court will not repeat in this Order a discussion of the proposed settlement terms that are substantially unchanged. Rather, as it did in the Revised Class Order, the Court examines here only the new terms in the currently proposed settlement agreement.

This incremental "threshold examination" of the overall fairness and adequacy of the settlement, in light of the likely outcome and the cost of continued litigation, leads fairly easily to the conclusion that the joint motion for preliminary approval is well taken. Ohio Public Interest Campaign v. Fisher Foods, Inc., 546 F. Supp. 1, 7 (N.D. Ohio 1982). This conclusion is warranted because, with few exceptions, it appears that the latest proposed settlement contains terms that are either the same as or better than the

prior proposal.[1] Examples of how the current proposed settlement agreement appears both more fair and more adequate to the plaintiff class include:

Earlier Proposed Settlement Agreement	Current Proposed Settlement Agreement
Total Settlement Value approximately $630 Million.	Total Settlement Value estimated at a minimum of $1.033 Billion.
Opt-out claimants will face liens on Sulzer assets running in favor of the plaintiff class.	No such liens exist.
Claimants who have one revision surgery receive: $37,500 in cash and $20,000 in stock; $5,000 to their spouses; and payment of a large share of their private attorney's fees, if applicable.	Claimants who have one revision surgery receive: minimum of $160,000, most or all of which will be in cash; minimum of $1,600 to their spouses; and payment of a large (but slightly smaller) share of their private attorney's fees, if applicable.
Guaranteed Funding for Extraordinary Injuries of $30 Million.	Guaranteed Funding for Extraordinary Injuries of $80 Million.
No participation by Sulzer AG or Insurance Companies.	Substantial participation by Sulzer AG and Insurance Companies.
Large proportion of funds paid by Sulzer Medica come from anticipated future earnings.	Funds paid by Sulzer Medica to come from bank loans and convertible debt instruments.
$125 million for payment of medical expenses and third party subrogation claims.	$60 million for third party subrogation claims and unlimited payment of medical expenses for revision surgeries.
Vague Guaranteed Payment Option.	Firm Guaranteed Payment Option allowing class members to receive accelerated benefits, even if the Settlement Agreement does not receive Court Approvals.
Undefined "Matrix" factors regarding entitlement to payments from the Extraordinary Injury Fund.	Defined "Matrix" factors delineating payment entitlements and amounts from the Extraordinary Injury Fund.

[1] The Court reiterates that, because its review of the new proposed settlement is still preliminary, so too are its conclusions regarding the value of the benefits to class members.

Earlier Proposed Settlement Agreement	Current Proposed Settlement Agreement
Undefined amount of class counsel fees.	Allocation of less than 5% of the Settlement Amount for class counsel fees.

These examples all suggest the current proposed settlement serves the plaintiff class even better – that is, more fairly and adequately – than did the prior proposals. The Court is gratified to see substantial affirmation of its initial "belief that the discovery period will ensure that, in fact, the defendants are forced to suffer as great a judgment as is possible." Class Order at 40.

There are also, in the latest proposal, different allocations, which the Court has considered in its fairness analysis. For example, under the original proposed settlement, claimants who did not have revision surgery received a total of $3,250 (including spousal payments), while claimants who had one revision surgery received about 20 times this amount, a total of $62,500. The respective numbers in the newest proposal are $1,250 and $161,600, a differential factor of about 130. While the allocation between subclasses has clearly changed, it still remains true that the allocation to each subclass appears reasonably fair and adequate, and also appears to be the subject of honest negotiation between separate counsel for each subclass. Similarly, the original proposed settlement allocated $4 million for a research fund and $20 million for a medical monitoring fund; the newest proposal allocates only $1 million for both medical monitoring and research, but allocates much more to payment of "in-pocket damages" to each claimant. The Court's preliminary conclusion is that this re-allocation remains fair, and even answers the objections of class members who complained that the original allocation was inappropriate.[2]

[2] That is, this new allocation appears to strengthen the factor of the "class's reaction to the settlement." Class Order at 48.

Finally, the current proposed settlement agreement is changed in that it settles the claims of persons who received a reprocessed hip implant; the prior settlement agreement did not address these claims.[3] The inclusion of these new claimants, however, does not materially affect the fairness of the proposed settlement. The defect supporting the right of these new class members to recover damages is essentially the same as the defect supporting the right of recovery of every other class member. Under the terms of the proposed settlement, there are now only 64 additional persons entitled to share in the current settlement proceeds by virtue of having been implanted with a reprocessed hip implant. An individual who, in the future, undergoes revision surgery to remove a reprocessed hip shell will have his or her recovery funded under class terms but from additional fund, to be transferred to the Settlement Trust directly from Sulzer. The Court finds that the low number of additional "reprocessed shell" claimants who have the option to share in the current settlement proceeds will not materially change the amount of damages available to each of the other class members. Indeed, given the increase in the total settlement amount, the addition of the

[3] After Sulzer Orthopedics recalled its Inter-Op hip implants, it "reprocessed" some of the returned units – that is, it "re-cleaned" some of the never-implanted, recalled shells – and then re-sold the shells. Between 5-6,000 of these reprocessed units were then implanted. Earlier, the Court expressed concern about including persons implanted with reprocessed shells in this class action because it was unclear "whether commonality, typicality, and adequacy existed in connection to these claims." The Court opined at that time that "there may exist significant factual and legal differences between (a) persons who received Inter-Op hip implants bearing lubricant residue on their surface and (b) persons who received implants that, at one time, had lubricant residue on their surface but were first reprocessed and cleaned." Class Order at 21. Factual discovery since that time, however, has given the parties reason to stipulate that the facts and law surrounding claims of persons implanted with reprocessed shells are substantially the same, if not identical, to the facts and law surrounding claims of persons implanted with shells that were not reprocessed. As the Court ruled in a separate Order granting a joint motion to amend the class definition and joint motion to amend the complaint, any factual and legal differences between persons with "original" implants and "reprocessed implants" are outweighed by the factual and legal similarities; "original hip shell" claimants share at least as much in common with "reprocessed hip shell" claimants as they do with "knee claimants." Put simply, the defect, injury, and causation in all cases is virtually the same.

new sub-class clearly has not detracted from the settlement value available to already-existing class members. The Court finds, accordingly, that the inclusion of the new sub-class of reprocessed shell recipients does not detract from the fairness of the proposed settlement.

In sum, the Court's preliminary assessment of the current proposed settlement is that it is "fair, adequate, and reasonable, as well as consistent with the public interest." United States v. Jones & Laughlin Steel Corp., 804 F.2d 348, 351 (6th Cir. 1986).

IT IS SO ORDERED.

s/Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE